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IN THE

Supreme Court of the United States

October Term, 1971.

[redacted]c. No. 71-1444

SHARON BLUM,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

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IN THE

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OCTOBER TERM, 1971.

MISC. NO.

SHARON BLUM,

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v.

COMMONWEALTH OF PENNSYLVANIA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

SHARON BLUM,[1] your Petitioner, respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Pennsylvania entered in the above entitled case on March 8, 1972.

OPINION BELOW.

The Supreme Court of Pennsylvania denied a petition for allowance of appeal on March 8, 1972, without a written opinion. A copy of its order appears in Appendix A hereto. The Superior Court of Pennsylvania had affirmed the judgment of the trial court in a Per Curiam

1. Petitioner has married since the date of her indictment and trial, and is now Sharon Blum Leon; however, she will be referred to throughout this Petition by the name under which she was tried and convicted.

opinion filed October 28, 1971, with two of the seven Justices dissenting. That opinion has been reported at 220 Pa. Super. 703, 282 A. 2d 737, a copy of which appears in Appendix B hereto. The Trial Judge filed an opinion and order dated November 22, 1968, which opinion is reported in 18 Bucks Cty. L. R. 547, and a copy of which appears in Appendix C hereto.

JURISDICTION.

The order of the Supreme Court of Pennsylvania denying the Petition for Allowance of Appeal (Appendix A, *infra*, p. A1), was entered on March 8, 1972. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3).

QUESTIONS PRESENTED.

1. Where local police officers, acting without a search warrant or arrest warrant, stop an auto driven by Petitioner, based on a description of auto involved in recent robbery, arrest Petitioner and passenger, take the keys to the car, lock the car, have it towed to police station and later seach the car without obtaining a search warrant, and where there is no local statute making the car forfeit to the state, does such search violate *Preston* as interpreted by *Chambers* and *Coolidge?*

2. Where property obtained during a search of the car is offered in evidence at trial against Petitioner as corroboration of the circumstantial evidence against her, does Petitioner have standing to object to that evidence where she was driving the car at the time it was stopped, even though she was not the owner, but was accompanied

by the son of the owner and they were driving the car with permission, and even though the car was not searched immediately following the arrest, but was searched after it was towed to the police station?

3. Does the Pennsylvania Muncy Act unconstitutionally discriminate against women on the basis of sex, since it provides that in sentencing women convicted of crime the Court must impose only a maximum term of imprisonment, while in sentencing men the Court must impose a minimum as well as a maximum sentence?

CONSTITUTIONAL PROVISIONS INVOLVED.

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> "Section 1. . . . nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Fourth Amendment to the Constitution of the United States provides in pertinent part:

> "The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures shall not be violated. . . ."

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; . . . ."

STATEMENT OF THE CASE.

Legal Proceedings.

On September 16, 1965, Petitioner, Sharon Blum, was charged in two bills of indictment, each containing six counts, arising out of two separate robberies. Bill number 414-2 charged her with armed robbery, robbery, burglary, larceny and receiving stolen goods from the operator of a Seven-Eleven grocery store on March 8, 1965, and with conspiring with Morey Fisher to commit said offenses. Bill No. 414-3 charged her with similar offenses arising out of a robbery of a cleaning establishment on March 13, 1965. The named co-conspirator and accomplice, Morey Fisher, was charged with the same offenses in separate bills.

Prior to trial, a Petition to Suppress was filed and a hearing was held before Honorable Paul R. Beckert, Judge of the Bucks County Court. This testimony is summarized below (page 6 *et seq., infra*). The petition to suppress the evidence was denied by the Court, which entered an oral Order at the close of the testimony.

Thereafter, Petitioner Blum was tried before Judge Beckert and a jury. At her trial, Morey Fisher, who had pleaded guilty to both of these robberies, testified against her. Except for his testimony, all of the evidence against Petitioner Blum was circumstantial. This testimony is also summarized below (page 7 *et seq., infra*).

Nonetheless, the jury convicted her on all counts of both bills. After the verdict was recorded, counsel requested a delay of two days in sentencing to enable him to discuss with his client the filing of a Motion for New Trial. The Court released her pending appearance in two days on the posting of $5000.00, the same amount of bail as had been posted since her arrest. However, the Court

ordered that if motions were to be filed, the bail would be increased to $10,000.00.

On October 28, 1966, Petitioner and her attorney told the Court that they did not desire to file motions in the nature of Motion for New Trial or Motion in Arrest of Judgment, but were willing to have sentence imposed. The Court, after hearing from Petitioner and her counsel, sentenced Miss Blum to pay the costs of prosecution and committed her to the State Industrial Home for Women at Muncy, Pennsylvania, for an indefinite period. On Monday, October 31, 1966, Petitioner through her new counsel filed a Motion for New Trial. Thereafter the District Attorney filed a Petition to Dismiss the Motion for New Trial, which was answered by defense counsel. On Petition of defense counsel, a hearing was held by the Trial Court to determine whether she had intelligent and knowing understanding of the consequences of failing to file a Motion. The Court found that there had been no denial of Defendant's constitutional rights.

Petitioner appealed to the Superior Court of Pennsylvania, which, after argument, reversed and remanded the case to the Bucks County Court with directions to consider and dispose of her Motion for a New Trial. *Commonwealth v. Blum*, 210 Pa. Super. 529, 233 A. 2d 613 (1967).

Petitioner then filed additional and supplemental reasons for new trial and the case was argued before the Bucks County Court en banc. On November 22, 1968, Judge Beckert filed an Opinion and Order on behalf of the Court denying motion for new trial. (Appendix C, *infra*, p. A3). On December 6, 1968, Petitioner Blum appeared before Judge Beckert who again resentenced her under the Muncy Act, PA. STAT. ANN. tit. 61, § 566 *et seq.* (Purdon's Pocket Part) which had been amended following the decision of the Pennsylvania Supreme Court in *Commonwealth v. Daniels*,

430 Pa. 642, 243 A. 2d 400 (1968). The new sentence imposed a term of imprisonment of a maximum of two-and-a-half years concurrently on each bill, and ordered that she be given credit for the time which she had served following her last sentence until she was admitted to bail, which amounted to almost one year in jail. Petitioner was permitted to renew her bail conditioned upon perfecting an appeal within twenty days. She did thereafter timely file an appeal in the Superior Court, and after hearing argument on March 23, 1970, on October 28, 1971, the Superior Court filed an order affirming the judgment and sentence of the Trial Court. Two of the seven Justices sitting on the case dissented and would have granted a new trial.

Petitioner thereafter timely filed a Petition for Allowance of Appeal in the Supreme Court of Pennsylvania. That Petition was denied on March 8, 1972, without an opinion.

Summary of Evidence on Pre-Trial Motion to Suppress.

At the hearing before Judge Beckert on December 10, 1965, in connection with the Motion to Suppress Evidence, the following testimony was elicited.

The testimony of the arresting officer, Detective Wagner, established that on March 13, 1965, he received a radio message about a robbery, as a result of which he proceeded to the intersection of Routes 413 and 1. There he observed a late model convertible Cadillac, with a white bottom and a black top, driven by a female and containing a male occupant, similar to the description he had received. He followed this car, noting that the license number was similar to that of a similarly described automobile which had been seen pulling away from the scene of a robbery at the Seven-Eleven grocery store on March 8, 1965, which he had been investigating. The officer followed the car on

Route 413 to approximately 100 feet north of its intersection with Newportville Road, where it was stopped by Private Snyder driving a second police car, at approximately 6:59 P. M. At no time while he was following this car did it exceed the speed limit. Both Detective Wagner and Private Snyder then approached the car with drawn guns. Both occupants were taken out of the car, lined up against it with their hands on the car. Thereafter Detective Wagner requested the keys to the car, and Miss Blum, after saying that she was going to faint and dropping them, retrieved them and gave them to Detective Wagner. Detective Wagner then locked the car and later it was towed to the Middletown Police Headquarters where it was thereafter searched. In the meantime, Private Snyder and Officer Underdown of the Bristol Township Police Department took Blum and Fisher to the Middletown Police Headquarters, where they were formally placed under arrest at 7:23 P. M. As the Trial Court noted, they were actually under arrest from the time they were first taken into custody. The search of the car, which was registered in the name of Fisher's mother, disclosed a .22 caliber Strum Ruger target pistol, sun glasses and gloves. Both suspects were also interrogated while at the station. The officer did not testify that they were warned of their constitutional rights. It was admitted that no search warrant was obtained, although one could have been.

Summary of Evidence at Trial.

The evidence at the trial itself before Judge Beckert, commencing October 25, 1965, can be summarized as follows.

The assistant manager of the Seven-Eleven store testified that on March 8, 1965, he was held up by a man who he identified as Morey Fisher. A woman who was

making a phone call from a booth outside the store at approximately the time of the robbery testified that she saw a girl, whom she identified as Sharon Blum, sitting in a white Cadillac outside the store while she was making the call. She did not see the car pull away.

The owner of the cleaning establishment testified that on March 13, 1965, she was robbed by a male whom she also identified as Morey Fisher. She also testified that she saw a Cadillac pull away from the curb after the robbery. A witness who was driving to a tavern next door to that cleaning establishment said that as he was pulling into a driveway leading to both stores he saw a Cadillac driven by a girl pull out of that driveway without any lights. In addition, Detective Wagner and Officer Ashton of the Bensalem Police Department testified to arresting Miss Blum and Fisher on March 13, searching the car and finding a gun, sun glasses and gloves and cash therein, as well as some cash on Fisher.

The only direct evidence against Miss Blum was the testimony of Fisher himself. He admitted holding up both stores. However, he testified this was done with the knowledge of Miss Blum. This was contradicted by Sharon Lee Blum, who testified that she and Fisher had been going together for some time and talking about getting married. On March 8, 1965, they went to Reedman's to pick up a part for his car. She drove because he had no license. The part was not in. As they were driving home she ran out of cigarettes and they stopped at the Seven-Eleven store and Fisher went in to get some, and came out a few minutes later. She denied that he discussed holding up the store before or after, and she denied that he ever showed her a gun. She testified that on March 13, 1965, they were on their way back to Reedman's to get the part when she made a wrong turn. Fisher, who had been nap-

ping in the car, woke up and told her to pull into the nearest shopping center so he could ask directions. He went into the cleaning establishment and came out shortly thereafter. Again, she testified, he did not tell her anything about holding up the store and did not show her a gun. Miss Blum also offered the testimony of numerous character witnesses who testified to her good reputation in the community.

REASONS FOR GRANTING THE WRIT.

The decision in this case has left a confusing and misleading precedent in Pennsylvania on two substantial questions under the federal Constitution, in the search and seizure field, where the state courts have decided contrary to the applicable decisions of this Court:

(1) whether police can lawfully stop a car on a highway without a search or arrest warrant, can arrest the occupants for suspected participation in a recent robbery, can then take the keys from the driver, lock the car, tow it to the police station without any exigency and without any statutory authority for seizing or forfeiting the car, and thereafter search the car, still without having obtained a search warrant; and

(2) whether the driver of the car, who is not the owner but who is accompanied by the son of the owner and has permission to drive the car, has standing to challenge the constitutionality of the search and seizure of evidence found in the car which is later used at her trial.

There has been great confusion and variation in interpretation by state courts of the decision of this Court in *Preston v. United States*, 376 U. S. 364 (1964). The subsequent decisions of this Court, in applying the *Preston* case, *Cooper v. California*, 386 U. S. 538 (1967), *Chambers v. Maroney*, 399 U. S. 42 (1970) and *Coolidge v. New Hampshire*, 403 U. S. 443 (1971), have been misinterpreted and misapplied by the states in a conflicting manner. Furthermore, the state courts have also been inconsistent in their determination of the standing of an individual to test an illegal search and seizure, particularly in car search situations; those courts have misinterpreted the decision of this Court in *Jones v. United States*, 362 U. S. 257 (1960). The confusion of the doctrines and apparent mis-

application of these cases is most clearly demonstrated in the case at bar. Here, the prosecutor admitted that the search was unlawful under the *Preston* case; however, the trial court refused to accept that admission, and justified that refusal by an unusual interpretation of the time of arrest, and alternatively, by concluding that Petitioner lacked standing to contest the seizure of items from a car driven by her even though the evidence was offered against her at trial, simply by concluding that she was not the owner of the car and was not actually in it when it was searched. The affirmance of the trial court's decision by the Superior Court with a four-word order, without opinion, and with two justices dissenting, did not provide any guidance to other Pennsylvania courts on these issues; nor did the Supreme Court's refusal to review the case help to provide clarity or to correct an error of constitutional dimension.

In addition, the case poses the question of utmost importance to all women in Pennsylvania convicted of crimes: does the Muncy Act violate the constitutional rights of women, since it provides that courts in pronouncing sentence on women shall not fix a minimum but only a maximum term of imprisonment, even though in pronouncing sentence on men, the courts must impose both a minimum and a maximum term of imprisonment.

1. This Court Should Decide Whether the Warrantless Search in This Case Violated Preston v. United States, as Interpreted by Chambers v. Maroney and Coolidge v. New Hampshire.

Prior to the trial of this case, Petitioner filed a Petition to Suppress certain evidence, alleging that it had been obtained by an unlawful search and seizure without a warrant. After a hearing on the Petition, Judge Beckert de-

nied the Petition, entering an oral Order, concluding that: there was probable cause to search the car in question, as the search was incidental to a lawful arrest made upon probable cause; and Petitioner did not possess a constitutional right to raise the question, as there was no showing that the car was in her control, since the car was owned by someone not present and the son of the owner of the car was a passenger at the time of the stopping; and that she was not actually in the car the time of the search.

During oral argument in this Court in the first appeal and in his brief filed in that appeal, the District Attorney of Bucks County conceded that Judge Beckert had erred in concluding that there was probable cause for the arrest and that the search was incident to the arrest. He admitted that the decision of the Supreme Court of the United States in *Preston v. United States*, 376 U. S. 364 (1964) clearly governed this case. In his brief before the Bucks County Court en banc he did not even address this issue. However, Judge Beckert refused to accept the Commonwealth's "confession of error" and based his opinion on two grounds: the search was incident to a lawful arrest; and Appellant had no standing to raise this issue. It is respectfully submitted that the Judge had misinterpreted this Court's decisions on both issues, and that the refusal of the Appellate Courts of Pennsylvania to pass on this issue leaves unsettled the law on a major constitutional question affecting criminal justice.

When the Trial Judge rendered his decision, it appeared to fly in the face of the decision of this Court in *Preston*. In *Preston* this Court laid down the clear guidelines that the search must be contemporaneous with the arrest in time and place. Also see *Stoner v. California*, 376 U. S. 483 (1964), decided on the same day as *Preston*.

It is extremely doubtful whether in the case at bar there was probable cause for stopping the car driven by

Petitioner Blum and containing Defendant Fisher nor for placing them under arrest on the scene or thereafter. The only information available to the officer who stopped the car was that it approximated the description he had received on his radio as having left the scene of a robbery.[2] The officer did not observe any violation of law committed by the occupant of the car, and had nothing more than a mere suspicion. This clearly does not constitute probable cause for a warrantless arrest. *Ker v. California,* 374 U. S. 23 (1963); *Beck v. Ohio,* 379 U. S. 89 (1964). In fact, the Trial Court found that the officer had no more than reasonable suspicion to stop the car.

Nonetheless, this Court need not even address the question of whether the initial stopping was valid. Even if it were to assume that the stopping was valid, the subsequent search was not lawful, since it was not contemporaneous in time or place with the arrest.

Judge Beckert in the opinion for the Court en banc concludes that the search was not made until after the formal arrest of defendants at police headquarters, which was at 7:23 P. M. He admits that no search prior to the arrest could have been justified without a warrant. However, Judge Beckert overlooked the fact that he had made a factual determination that the defendants were actually under arrest when the car was stopped on the highway at 6:59 P. M. when the officers approached the car with drawn guns and forced both occupants to line up against the car with their hands on the roof. Such a factual finding was compelled by the decision of this Court in *Miranda v. Arizona,* 384 U. S. 436 (1966) which laid to rest technical arguments dealing with the formal pronouncement of arrest.

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2. The fact that the car was believed to have been the one involved in the holdup on March 8, 1965, five days earlier, certainly could not constitute probable cause for stopping it and arresting its occupants on March 13, 1965.

The Court there equated arrest with police custody or any other deprivation of freedom of action in any significant way. 384 U. S., at 477-478.

Accordingly, where the officer stopped the car, approached it with drawn guns, made the driver and passenger line up against it with their hands on the roof, took the keys from the driver, locked the car, took the driver and passenger to police headquarters, had the car towed to headquarters where it was searched almost one hour later, it requires a feat of mental gymnastics to argue that the search was incidental to and contemporaneous with the arrest of those individuals.

If there were any question left as to the intention of this Court as enunciated in the *Preston* case, these would seem to have been laid to rest by the subsequent decisions in *James v. Louisiana*, 382 U. S. 36 (1965) (a search of defendant's home two blocks from the scene of his arrest); *Dyke v. Taylor Implement Mfg. Co.*, 391 U. S. 216 (1968) (where defendants were arrested for reckless driving, were taken to jail, their car parked outside where it was searched by police); *Chimel v. California*, 395 U. S. 752 (1969) (search of a three bedroom house following defendant's arrest in the house pursuant to an arrest warrant was held to be too broad and not incident to a valid arrest).

The appellate courts of Pennsylvania thereafter seemed to follow the lead of the Supreme Court of the United States. See *Commonwealth v. Ellsworth*, 421 Pa. 169, 218 A. 2d 249 (1966) (where the search of defendants' hotel room approximately two hours after the arrest of defendants was held not be contemporaneous in time of place); *Commonwealth v. Harris*, 429 Pa. 215, 239 A. 2d 290 (1968), reversing 209 Pa. Super. 27, 23 A. 2d 881 (1966) (where defendant was arrested as he entered his house after parking his automobile directly in front of the house, and the immediate search of the automobile was held not to be con-

temporaneous); *Commonwealth v. Cockfield*, 431 Pa. 639, 246 A. 2d 381 (1968) (where a search of defendant's unoccupied car prior to his arrest, and the subsequent search of his automobile at the police station following his arrest and arraignment were both held to be not contemporaneous or incidental to a lawful arrest).

However, after Judge Beckert filed his Opinion and after the case had been argued in the Superior Court of Pennsylvania, but before it had been decided by that Court, this Court rendered its decision in *Chambers v. Maroney*, 399 U. S. 42 (1970). That case, relying in part on *Cooper v. California*, 386 U. S. 538 (1967), seemed to limit the effect of *Preston*. In *Chambers*, the Court spoke about exigent circumstances justifying the removal of a car from the highway and the subsequent search at a police station. In footnote 10 of the Opinion, this Court noted that a search at the point of arrest was impractical and not safe for the officers, and it would be convenient to the owner to have it searched at the station house. 399 U. S., at 52. Then, just one year later, this Court, in *Coolidge v. New Hampshire*, 403 U. S. 443 (1971), repeated and reinforced the *Preston* decision, citing *Chambers* with a notation that it was to be "compared" with *Preston*. It also distinguished *Cooper v. California* and noted that even in *Cooper*, the Court reaffirmed *Preston*.[3]

Apparently because of confusion over the meaning of these cases, both the State and Federal Courts have divided

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3. It should be noted that *Cooper*, which dealt with the validity of a warrantless search of a car held for forfeiture under state law, did not cite or refer to *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U. S. 693 (1965). In that case this Court noted that the car itself, which was not *per se* contraband, but was only derivatively contraband, could not be declared forfeit by the state unless and until there had been some use of the illegality seized evidence, which would violate the Fourth Amendment. In *Cooper*, apparently the Court assumed that the car was contraband without any mention of this issue.

on their interpretation of *Preston*, *Cooper*, *Chambers* and *Coolidge*.

One group of State cases apparently adheres strictly to *Preston* and considers *Chambers* applicable only where there is immediate danger to the safety of police or evidence. See, for example: *State v. Wilson*, 106 Ariz. 411 (1970), and cases cited therein; *cf. State v. Tosatta*, 107 Ariz. 231 (1971); *Petty v. State*, 411 S. W. 2d 6 (Ark. 1967); *Mozzetti v. Superior Court*, 4 Cal. 3d 699 (1971); *Paxton v. State*, 363 N. E. 2d 636 (Ind. S. C. 1970); *Williamson v. State*, 248 So. 2d 634 (Miss. S. C. 1971) (search of truck at Courthouse morning following arrest); *People v. Witherspoon*, 8 Cr. L. 2262 (S. C. Mo. 1970) (search of trunk of car after driver already in custody for reckless driving).

Several Federal cases, arising in two different Circuits, seem to concur. See: *United States v. Resnick*, 10 Cr. L. 2467 (5th Cir. 1972); *United States v. Colbert*, 10 Cr. L. 2445 (5th Cir. 1972); *Williams v. United States*, 412 F. 2d 729 (5th Cir. 1969); *United States v. Day*, 10 Cr. L. 2445 (6th Cir. 1972).

A second group of State cases seem to suggest that once the police have justification for seizing a car, they do not thereafter need a warrant to make a thorough search or inventory, provided there is some practical reason for postponing the search. These cases draw heavily on *Cooper* and *Chambers*. See, for example: *People v. Woods*, 485 P. 2d 491 (Colo. 1971); *People v. Sullivan*, 29 N. Y. 2d 69 (1971) (where the car was towed away for illegal parking); *but cf. People v. Lewis*, 7 Cr. L. 2297 (N. Y. Ct. App. 1970) (officer recognized and arrested driver and at station house after finding three-year old arrest warrant outstanding for driver, then searched car; search held invalid); *Heffley v. State*, 423 P. 2d 666 (Nev. 1967); *State v. Criscola*, 21 Utah 2d 272 (1968); *State v. Dombrowski*, 44 Wisc. 2d 486 (1969); *cf. State v. Dell*, 258 La. 1024 (1971); also *cf. Rudolph v.*

Commonwealth, 10 Cr. L. 2252 (Ky. Ct. pp. 1971) (defendant arrested for drunkenness outside of auto, at which time officer observed a tape player in back of car; later at station house officer learned of recent robbery involving tape player, went back and seized player from car; seizure held reasonable).

However, several other Circuits take a different view and seem to agree with the second group of state cases. One Circuit, relying on *Chambers* shortly before *Coolidge* was decided, arrived at a similar conclusion. *United States v. Golembiewski*, 437 F. 2d 1212 (8th Cir. 1971). However, after *Coolidge*, that Circuit held that a search at the police garage was unreasonable under *Coolidge*, but concluded that it was harmless error. *Kaufman v. United States*, 10 Cr. L. 2343 (8th Cir. 1971). Also see *United States v. Young*, 11 Cr. L. 2058 (8th Cir. 1972), where the Court relied on *Cooper* to uphold a search of an in-custody counterfeiting suspect's car 8 hours after his arrest and seizure of the car. And see *United States v. Collins*, 439 F. 2d 610 (D. C. Cir. 1971) (where arrest in car without probable cause did not justify a search of the car).

United States v. Dento, 382 F. 2d 381 (3d Cir. 1967), relied on by Judge Beckert in the instant case, which was decided prior to *Chambers* and *Coolidge*, has been held not to be viable in light of *Chambers* and subsequent cases. See *United States v. Day*, 331 F. Supp. 254, 256 (E. D. Pa. 1971); also see *United States v. Mencke*, 11 Cr. L. 2038 (W. D. Pa. 1972), where a warrantless search of a drug defendant's auto shortly after his arrest at his parents' country home was held unreasonable because of failure of the arresting officers to obtain a warrant.

Some other state cases sustain searches subsequent to arrest on strained interpretations of what is contemporaneous and when such search is justified by exigencies. See, for example: *Williams v. People*, 7 Cr. L. 2296 (S. C.

Mich. 1970) (search of car 250 feet from place of arrest held to be substantially contemporaneous with arrest and reasonable). One federal Court seems to agree. See *United States v. Julian*, 10 Cr. L. 2138 (10th Cir. 1971) (where warrantless seizure and search of Dyer Act suspect's car outside his motel room following his arrest was justified on grounds of *Chambers*, without mention of *Coolidge*).

Although as noted above the Pennsylvania Courts seemed to follow *Preston*, even they have not been consistent. *Compare Commonwealth v. Ellsworth*, *Commonwealth v. Harris*, and *Commonwealth v. Cockfield*, all *supra*, *with Commonwealth v. Gordon*, 431 Pa. 512, 246 A. 2d 325 (1968), where the Court used the doctrine of necessity to sustain a search of an in-custody wounded suspect at a hospital even though the Court recognized that the search was not incidental to or contemporaneous with his arrest and a warrant could have been obtained.

Thus, to clarify the confusion between and within the various courts concerning this substantial federal question, this Court should review this case.

2. This Court Should Decide Whether Driver of a Car Who Is Not the Owner Has Standing to Contest a Search of the Car at the Police Station Subsequent to Her Arrest.

It is conceded that the car in question was titled in the name of Morey Fisher's mother, and it is also admitted that Morey Fisher was a passenger in the car when it was stopped. By the same token, it is clear that Petitioner Blum was driving the car at the time it was stopped and that she was doing so with the permission of Morey Fisher and apparently with the permission of his mother. There is no dispute that the evidence found therein was introduced against Petitioner Blum at the time of her trial. It is thus

incredible to suggest that Petitioner Blum had no standing to raise the constitutional question. Certainly the Commonwealth should not be permitted to place Petitioner on the twin horns of a dilemma—on the one hand saying that she does not have sufficient possession and control over the car to raise the constitutional objections, while on the other saying that anything found therein can be used against her in evidence because the car was within her possession and control. In *Jones v. United States*, 362 U. S. 257, 263-264 (1960), this Court solved a similar dilemma, holding that presence in an apartment with permission of the owner was sufficient to give standing to raise constitutional questions as to validity of the search of the apartment. Likewise, here there is no allegation or proof that Morey Fisher did not have his mother's permission to use the car nor that Petitioner was driving without his permission. Accordingly, it is just as clear as in *Jones* that Petitioner has standing to object to the use of the evidence against her.

It should be noted that in the *Preston* case, *supra*, this Court was not even slightly bothered by the fact that the car in which the three men (including petitioner) were arrested was owned by one of the other men; no one questioned the standing of petitioner. In none of the numerous car search cases has counsel been able to find any suggestion that a driver or passenger has no standing to object—in fact, in none has the question of title ever been raised. See, *e.g.*, *Commonwealth v. One 1958 Plymouth Sedan*, 380 U. S. 693 (1965), and 418 Pa. 457, 211 A. 2d 536 (1965); *Beck v. Ohio*, 379 U. S. 89 (1961); *Rios v. United States*, 364 U. S. 253 (1960); *Henry v. United States*, 361 U. S. 98 (1959); *Brinegar v. United States*, 338 U. S. 160 (1949); *United States v. DiRe*, 332 U. S. 581 (1947); *Carroll v. United States*, 267 U. S. 132 (1925).

If there were any question about the standing of Petitioner to object to use of this testimony, it seemed to be

laid to rest by this Court in *Simmons v. United States*, 390 U. S. 377 (1968). In that case, the F. B. I. introduced into evidence against Garrett a suitcase and clothing found in the basement of a home belonging to Mrs. Mahon, mother of Andrews, who was Garrett's co-defendant. The Court reviewed the holding of the *Jones* case and concluded that it is sufficient standing if defendant is legitimately on the premises when the search occurs. 390 U. S. 26, 390. Here, Petitioner Blum was legitimately on the premises—*i.e.*, in the car—when the car was stopped and when the arrest in fact took place. She thus has sufficient standing to object. See *Contreras v. United States*, 291 F. 2d 56 (9th Cir. 1961); *Barnett v. United States*, 384 F. 2d 848 (5th Cir. 1967); also see *Plazola v. United States*, 291 F. 2d 56 (9th Cir. 1961); *cf. Diaz-Rosendo v. United States*, 357 F. 2d 124 (9th Cir. 1966).

Judge Beckert attempts to suggest that Petitioner was not lawfully on the premises (*i.e.*, the car) because she was in the police station at the time the car was actually searched. This again ignores the Judge's factual finding that Petitioner Blum and Morey Fisher had already in fact been arrested and placed in custody and were forced by the police to go to the police station. If Judge Beckert's logic were followed, then the police who desire to search a premise could arrest the occupant, forcibly remove him to the police station and thereafter search the premises at their leisure and then argue that the occupant was not on the premises at the time the premises were searched. Judge Beckert also attempts to justify his conclusion by stating that the record fails to support the position that Petitioner Blum was the owner or possessor of the items seized or legitimately in the automobile when the search was conducted. The burden is on the Commonwealth, not on the Petitioner, to justify the warrantless search and seizure.

In any event, to suggest that the record does not support Petitioner Blum's right to operate and be in the motor vehicle is to ignore the plain facts.

The type of approach suggested by Judge Beckert is soundly criticized in a recent exhaustive study published in the University of Pennsylvania Law Review: see White and Greenspan, *Standing to Object to Search and Seizure,* 118 U. OF PA. L. REV. 333 (January 1970).

There are many recent appellate decisions in Pennsylvania which give implicit recognition to a broad interpretation of *Jones.* In *Commonwealth v. Harris, supra,* the Supreme Court of Pennsylvania suppressed evidence found in the car parked directly outside the house in which defendant was arrested, even though the defendant explained that the auto did not belong to him. In *Commonwealth v. Dussell,* 214 Pa. Super. 1, 248 A. 2d 857 (1969), this Court in holding the search of an automobile valid never questioned the defendant's right to raise the issue even though the car was apparently stolen. In *Commonwealth v. Pinno,* 433 Pa. 1, 248 A. 2d 26 (1968) the Court ruled inadmissible evidence found in an unoccupied convertible which defendant had previously been observed driving without ever questioning defendant's standing to raise the question and without any proof of ownership of the automobile.

Also see *Mancusi v. DeForte,* 392 U. S. 364 (1968) where one officer of a union was held to have standing to object to a search of a joint office he shared with another individual.

However, many of the decisions of State and Federal courts subsequent to *Jones* differ in their application of the standing doctrine.

The Federal Circuits are split on the question of whether a Dyer Act defendant has standing to object to search of the stolen car. *Compare Glisson v. United States,*

406 F. 2d 423 (5th Cir. 1969); *Cotton v. United States*, 371 F. 2d 385 (9th Cir. 1967); *Simpson v. United States*, 346 F. 2d 291 (10th Cir. 1968); and cases cited in each, *with Palmer v. State*, 10 Cr. L. 2455 (Md. Ct. Sp. App. 1972) and cases discussed therein. Also see *United States v. Golembiewski*, 437 F. 2d 1212 (8th Cir. 1971) where the court avoided the issue of whether a passenger in a stolen car has standing to object to a search of the car. In *United States v. Cobb*, 432 F. 2d 716 (4th Cir. 1970), the Court concluded that the driver of a car registered in the name of another had standing to object to a search of the trunk of the car even though he had run from the car upon seeing the officers. And in *Williams v. United States*, 412 F. 2d 729 (5th Cir. 1969) a defendant who had denied ownership of a car was permitted to object to use of evidence found in that car after a warrantless search.

State courts have varied in their approach. The following cases have sustained standing of persons who were not actual owners of the property concerned: *Lanford v. People*, 489 P. 2d 210 (Colo. 1971) (visitors in apartment); *Paxton v. State*, 263 N. E. 2d 636 (Ind. 1970) (passenger in car); *Hebron v. State*, 281 A. 2d 547 (Md. Ct. Sp. App. 1971) (transient occupant of searched apartment); *Williamson v. State*, 248 So. 2d 634 (Miss. 1971) (driver of rental truck); *State v. Russo*, 470 S. W. 2d 164 (Mo. 1971) and *Witherspoon v. State*, 8 Cr. L. 2262 (Mo. 1970) (passenger in car had standing to object to warrantless search of trunk after driver was arrested); *Wing v. State*, 10 Cr. L. 2210 (Okla. 1971) (search of girl friend's car near scene of robbery; however, held to be harmless error).

On the other hand, the following Courts have interpreted *Jones* very narrowly. *Davidson v. State*, 252 So. 2d 108 (Ala. 1971) (son who had been in mother's car several hours before it was searched had no standing to

object); *State v. Oliver*, 273 A. 2d 867 (Conn. 1970) (defendant has no standing to object to search of unoccupied car not belonging to him); *United States v. Wolfson*, 299 F. Supp. 1246 (D. Del. 1969) (defendants cannot object to search of garage rented by other defendants when they were not present); *People v. Joshua*, 169 N. W. 2d 105 (Mich. Ct. App. 1971) (search of other occupants of car defendant had been driving when arrested for traffic violation); *State v. Holloway*, 187 N. W. 2d 85 (Neb. 1971) (interloper has no standing); *and compare Commonwealth v. Williams*, 219 Pa. Super. 109, 280 A. 2d 430 (1971) (defendant cannot object to evidence seized from another arrested outside defendant's apartment), *with Commonwealth v. Smith*, 201 Pa. Super. 511, 193 A. 2d 778 (1963) (one defendant cannot object to search of second defendant's apartment even though he was present since second defendant invited the officers to enter and search).

This Court should thus review the decision in this case to decide the scope of the doctrine of standing.

3. The Act Under Which the Appellant Was Sentenced Unconstitutionally Discriminates Against Women and the Sentence Imposed on Her Was Illegal.

Appellant's original sentence, imposed on October 28, 1966, was under the Muncy Act, PA. STAT. ANN. tit. 61, § 566, and consisted of an indefinite period of imprisonment as required by that Act. While the first appeal was pending in this case, the Supreme Court of Pennsylvania rendered its decision in *Commonwealth v. Daniels*, 430 Pa. 642, 243 A. 2d 400 (1968), holding that the Muncy Act unconstitutionally discriminated against women. Almost immediately thereafter the Legislature amended the Muncy Act as follows:

> "Any court of record in this Commonwealth, exercising jurisdiction, may, in its discretion, sentence to the

> State Industrial Home for Women any female over sixteen years of age, upon conviction, upon pleading guilty of, the commission of any criminal offense punishable under the laws of this State. Any due notice given to all county board of trustees of said State Industrial Home for Women that the said home is prepared to receive all women so convicted or pleading guilty is an offense punishable by imprisonment for more than a year who shall be sentenced to imprisonment, such sentence in all cases shall be to confinement in said State Industrial Home for Women. The court in imposing sentence shall not fix a minimum sentence, but shall fix such maximum sentence as the court shall deem appropriate, so long as such maximum sentence does not exceed the maximum term specified by law for the crime for which the prisoner is being sentenced." Act of July 16, 1968, PA. STAT. ANN. tit. 61, § 566 (Purdon's Pocket Part).

By the time Judge Beckert rendered his opinion and order on behalf of the Bucks County Court en banc, the new Act was in effect. Accordingly, when he resentenced Miss Blum he sentenced her under the provisions of the amended Act to a term of imprisonment of 2½ years.

The Act as amended now permits women to be treated like men with respect to the maximum sentence, which is the real sentence, as noted by the Supreme Court in the *Daniels* case. However, the Act still continues to discriminate against women with respect to the imposition of a minimum sentence. As noted in footnote 6 of the Supreme Court's opinion in the *Daniels* case, a woman technically becomes entitled to parole immediately upon commitment to Muncy. In practice, however, this is not true. The Superintendent of the State Correctional Institute at Muncy, in a letter to the Defender Association of Phila-

delphia in connection with the *Daniels* case, stated that prior to the amendment of the Muncy Act there was a schedule of time for girls to be considered for release. Although this was not designated as parole it was, in effect, equivalent to parole. Thus, Miss Blum, who was sentenced for armed robbery, would not be considered for parole under this schedule until the expiration of approximately 2½ or 3 years. Since her maximum sentence under the Act as amended was only 2½ years, this would mean in effect that she would undoubtedly not be paroled until expiration of her entire term.

Under the Act relating to sentencing of men, PA. STAT. ANN. tit. 19, § 1057, a minimum sentence must be imposed, which can be no more than one-half of the maximum and men become eligible for parole at the expiration of that minimum. Thus a man sentenced to a two and a half year term could have a minimum sentence of no more than 15 months.

Here, Sharon Blum served almost 12 months before she was released on bail and if she is ultimately returned to prison under this new sentence, even though she will be given credit for the time served, undoubtedly she will not be considered for parole until she has been there for some period of time which would exceed the minimum term allowable for a man. This is a denial of equal protection and due process.

This conclusion is strengthened by the recent Constitutional Amendment adopted by Pennsylvania which provides:

> **"Prohibition Against Denial or Abridgment of Equality of Rights Because of Sex**
>
> Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual." Art. 1, § 27.

CONCLUSION.

For all of the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Appendix.

IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 366 Allocatur Docket
(No. 208 October Term 1969)

COMMONWEALTH OF PENNSYLVANIA

v.

SHARON LEE BLUM,
Petitioner.

ORDER ON THE PETITION FOR ALLOWANCE OF APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT.

March 8, 1972. Denied. PER CURIAM.

IN THE

SUPERIOR COURT OF PENNSYLVANIA

Nos. 208, 209, October Term, 1969

COMMONWEALTH OF PENNSYLVANIA

v.

SHARON LEE BLUM,

Appellant.

Appeals From the Judgment of Sentence of the Court of Quarter Sessions of Bucks County at Nos. 414-2 and 414-3 of 1965.

JUDGMENT.

PER CURIAM Filed: October 28, 1971

Judgment of sentence affirmed.

HOFFMAN and CERCONE, *JJ.* dissent and would grant a new trial.

IN THE
CRIMINAL COURTS OF BUCKS COUNTY

Nos. 414-2, 414-3. Term, 1965.

COMMONWEALTH OF PENNSYLVANIA

v.

SHARON LEE BLUM

1st Ct.: Armed Robbery
2nd Ct.: Robbery
3rd Ct.: Burglary
4th Ct.: Larceny
5th Ct.: Receiving Stolen Goods
6th Ct.: Conspiracy

OPINION AND ORDER OF THE COURT.

Sharon Lee Blum [defendant] was charged in two identical multiple count indictments with the crimes of armed robbery, robbery, burglary, larceny, receiving stolen goods and conspiracy with one Morey Fisher [Fisher] to commit these offenses. Bill of Indictment 414-2 dealt with the commission of the above enumerated crimes at a certain Seven-Eleven grocery store, located in Middletown Township, this county, on March 8, 1965, the other, Indictment 414-3, at a cleaning establishment known as Crafton Cleaners, Bensalem Township, Bucks County, the latter robbery and related crimes taking place on March 13, 1965.

After trial, the jury rendered a verdict of guilty on all counts of both indictments.

The matter is presently before this court pursuant to the dictates of the Superior Court to dispose of motions for new trial filed after the sentence had been pronounced: *Commonwealth v. Blum*, 210 Pa. Superior Ct. 529, 535 (1967).

The first ground advanced by the defendant in her brief is that the trial judge erred in refusing to suppress certain tangible evidence, namely, a .22 caliber Strum Ruger revolver, a pair of gloves and a pair of sunglasses, all belonging to Fisher. These items were seized by the police during a search of a Cadillac automobile owned by Sylvia Fisher, Fisher's mother. Defendant maintains that the search of this vehicle and the ultimate seizure of the above items was unreasonable, as the search was conducted without a warrant and was not incident to a lawful arrest, since not conducted at the place where the vehicle was stopped, but at the police station.

At the suppression hearing, the following pertinent factual situation was developed:

On Saturday evening, March 13, 1965, at 6:50 P. M., Detective John A. Wagner, Jr., of the Middletown Township police department, heard a report at headquarters on the Bucks County Police Radio monitor that there had been a hold-up at the Crafton Cleaners in the neighboring township of Bensalem. According to the message received by Wagner, the perpetrators of the hold-up, a male and female, had fled the scene in a late model white Cadillac convertible with a black top, travelling east on Street Road toward U. S. Route 1 and the man was carrying a western-type revolver. Wagner immediately went to an unmarked patrol car and drove to the intersection of Route 413 and U. S. Route 1 in Middletown Township. At approximately 6:54 or 6:55 P. M., that is four or five minutes after the radio report of the robbery, a vehicle meeting the description of

the getaway car passed Wagner's car, travelling east on U. S. Route 1 and turned onto the southbound ramp of Route 413. Wagner proceeded to follow the Cadillac convertible and observed that the license number was Pennsylvania 449-46J. It should be noted at this juncture that the first three digits and last letter of the license number were the same as on a similar Cadillac which Wagner had observed the previous evening in the vicinity of the Seven-Eleven store, which had been robbed on March 8, 1965 by a male and female, who likewise made their escape in a late model white Cadillac with a black top. Prior to March 13, 1965, Wagner, by extensive investigation, had determined that there was only one white convertible Cadillac registered in the Commonwealth of Pennsylvania with a six item license number containing the first three digits 449 with the last item being the letter "J" and that was titled to a Sylvia Fisher.

Wagner radioed the license number of the Cadillac to his headquarters with the request that a uniformed police officer, in a marked vehicle, be dispatched to stop the Cadillac. A short distance thereafter, Officer Snyder passed Wagner's car and fell in behind the Cadillac. At this point Wagner radioed Snyder to take precautions since, based upon the report that Wagner had received, there was a possibility that the occupants were armed. Snyder stopped the Cadillac which was being operated by Blum, in which Fisher was a passenger, on Route 413 at its intersection with Newportville Road at 6:59 P. M. After the passage of approximately five minutes the driver and passenger of the Cadillac were taken from the place of stopping to the Middletown Township police headquarters. The Cadillac was not searched when stopped, but locked by Detective Wagner and ordered towed to the police headquarters. Approximately fifteen minutes later the defendant and Fisher were positively identified at police headquarters by

the victims of both the Seven-Eleven and Crafton Cleaners robberies as the perpetrators thereof. The Cadillac, in tow, arrived at police headquarters at approximately 7:45 P. M. Five minutes thereafter (7:50 P. M.) Detective Wagner, in the company of Sergeant McKenna, with the purpose of obtaining a western-type revolver described by the victims and the money taken from the recent robberies, searched the Cadillac and found a .22 caliber Strum Ruger revolver under the rear seat. A search by Chief Riempp and Sergeant Ashton, of the Bensalem Township police, uncovered a pair of sunglasses and gloves.

It is without any doubt that the search of the Cadillac vehicle was made without procuring a search warrant. We are convinced now, as we were convinced at the time of the suppression hearing, that the motion to suppress the aforesaid items of tangible evidence was rightfully and correctly dismissed. It is our conviction that this holding can be sustained on either one of, or all of, the following premises.

In order to be successful in a motion to suppress evidence allegedly unlawfully obtained, it is necessary that the defendant possess a standing to raise such an objection, and not merely claim prejudice through the use of evidence gathered as a consequence of an unlawful search and seizure that is performed against the property of another. Subject to two exceptions hereinafter noted, a defendant who desires to raise a Fourth Amendment objection is required to demonstrate that he was the owner or possessor of seized property, or, that he had a possessory interest in the searched property, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of the search. The rationale behind the above thinking is founded on the principle that restrictions upon searches and seizures were designed for the protection against official invasion of privacy and security of property: *Jones v. United States*, 362 U. S. 257, 4 L. ed. 2d 697, 702.

The two exceptions to the above are: (1) where the seized evidence is itself an essential element of the offense charged, an example being possession of narcotics, and (2) no possessory interest need be shown by the defendant in the searched premises if it is shown that the defendant was legitimately on the premises when the search occurs: *Jones v. United States, supra; Simmons v. United States,* — U. S. —, 19 L. ed. 2d 1247, 1257 (1968). We are of the opinion and so hold that the facts of the instant case do not bring the defendant within the area of either exception.

Defense counsel attempts to bring his client within the exception of being legitimately on the premises, i.e., in the car when the search was conducted, when he states at page 10 of his brief to the lower court "Here Defendant Blum was legitimately on the premises—i.e., in the car—when the car was searched." This is *not* a fact of the present case. *Defendant was not in the car, but in fact in the police station and had, along with Fisher, been identified by the victims of the two robberies prior to the search of the Sylvia Fisher car.*

The Commonwealth's brief directs our attention to two cases from other jurisdictions holding that defendants, who were passengers in automobiles, had no standing to object to the search of the automobile without the benefit of a search warrant, even though the search was not found to be incident to a lawful arrest: *State v. Edwards,* 197 Kan. 146, 415 P. 2d 231 (1966) and *State of Maine v. Littlefield,* 213 A. 2d 431 (Maine) (1965). In each of these cases, the objecting defendants were in the custody of the police when the search was performed. We, therefore, have great difficulty in bringing ourselves to conclude that the mere act of operating the searched automobile at a time prior to the search gives the defendant Blum an exalted position of a person having a possessory interest in the automobile or in

being legitimately on the premises at the time of search, when the record clearly reveals that she was elsewhere.

There is no dispute but that the items seized were the property of Fisher and the automobile out of which they were removed was titled to a Sylvia Fisher. The record totally fails to support the position that the defendant was the owner or possessor of the items seized, or legitimately in the automobile when the search was conducted. The record, read in a light most advantageous to the defendant, gives rise at the best to a consentual operation of the Cadillac, granted to the defendant by Fisher. If an analogy to civil law is permitted, and we believe it is for limited purposes, *Commonwealth v. Bovaird*, 373 Pa. 47, 55 (1953); it cannot be said that Blum possessed any possessory interest in or to the Sylvia Fisher automobile by virtue of any bailment. The record is totally and completely silent of any evidentiary facts to the effect that Blum was operating the vehicle with the consent of the owner, or that delivery of any type, that is actual or constructive, was made by Sylvia Fisher to Blum. To the contrary, the only vestige of possession existing in Blum to the searched premises, i.e., the Cadillac, was her accommodating act of driving the vehicle for Fisher as the latter's operating privileges had been suspended. Therefore, the defendant lacks standing to raise the Fourth Amendment argument since in her pre-trial motion to suppress she neither alleged nor subsequently established the requisite interest in either the automobile searched or the property seized: *United States v. Grosso*, 358 Fed. 2d 154 (Third Circuit, 1966) reversed on other grounds, 390 U. S. 62, 19 L. ed. 2d 906 (1968).

Counsel for the defendant cites, in his brief, numerous cases dealing with the search of vehicles performed without the benefit of a search warrant and contends that in those cases there is no suggestion that the driver or pas-

senger has no standing to raise the protection of the Fourth Amendment. We believe that the cases so cited are distinguishable from our instant case in at least two particulars: (1) in many of the cases cited by defense counsel the question of standing had not been raised, and (2) where it can be ascertained from the opinion it appears that in the cases where the problem of standing was raised, or may have been raised, the person aggrieved by the search *was present in the vehicle at the time that the search was conducted.*

Nor can we comprehend the defendant's argument that the defendant was placed ". . . on the twin horns of a dilemma—on the one hand saying that she does not have sufficient possession and control over the car to raise the constitutional objections, while on the other hand saying that anything found therein can be used against her in evidence . . ." This argument, to us, does not hold water. Certainly if the gun, sunglasses and gloves had been seized from the home of Fisher without procuring a search warrant and later identified by Fisher at the time of trial as paraphernalia used by him, along with Blum, in perpetrating the hold-ups, we could conclude without any qualms whatsoever that Blum would not have had standing to suppress the objects seized. We can see that Blum would have been met with a dilemma when such evidence was admitted into evidence, for where such physical evidence is *coupled* with the testimony of Fisher as to having had these objects in his car or on his person while with Blum, it would have been most condemning evidence against Blum. The fact that evidence may be so condemning or convicting in its effect is not and never has been the test of whether it should be suppressed. The test has always been whether it was procured in violation of *her* rights against official invasion of *her* privacy and the security of *her* property.

The hearing judge, being the same person as the trial judge and the writer hereof, by oral order refused to suppress the aforementioned objects on the additional theory that these objects were procured incident to a lawful arrest. Initially, or at least such was our impression, the Commonwealth urged this proposition upon the court at the conclusion of the taking of testimony at the suppression hearing. We note, however, that the Commonwealth has either retreated from this position due to its interpreation of the holding in *Preston v. United States*, 376 U. S. 364, 11 L. ed. 2d 777 (1964) or, in the alternative, contends that the court bottomed its holding on this peg against the wishes of the Commonwealth. In either event, the Commonwealth disagrees that this search was incidental to a lawful arrest.

For reasons previously outlined we do not feel obliged to lean on this phase of our ruling as we are satisfied that lack of "standing" alone is sufficient to sustain our position. Nevertheless, and not motivated out of stubbornness, we are obliged to hold that this was a search incidental to a lawful arrest.

Defense counsel has stated in his brief of June 19, 1967 to the Superior Court (page 3) that they (Fisher and Blum, were formally placed under arrest at 7:23 P. M. We agree that the record supports this fact. It appears, therefore, that the status of the defendants Blum and Fisher, between the time of being stopped at 6:59 P. M. to 7:23 P. M., was similar to the status of the defendants in *Commonwealth v. Howell*, 213 Pa. Superior Ct. 33 (1968), that is to say, that the defendants were being detained by police based on, at least, the reasonable suspicion that defendants had committed a crime. This reasonable suspicion changed to probable cause to believe that the crimes of armed robbery were committed when the victims thereof identified the defendants as the perpetrators. It was im-

mediately following this identification that Blum was placed under arrest. It is difficult, if not impossible, to conceive of any logical argument being made by defense counsel to the effect that the police, at the time of the arrest, did not possess reasonable and probable cause to believe that the defendant had committed a felony: *Commonwealth v. Brayboy*, 431 Pa. 365 (1968). As previously noted, up to this point the Cadillac had not been searched. No search prior to the arrest could have been justified without a warrant. At the time of the arrest, the car was not at police headquarters but was in the act of being towed thereto. The search took place immediately after the Cadillac arrived at headquarters. We do not find, therefore, that *Preston v. United States, supra*, is controlling. We are satisfied that the search of the Cadillac automobile was substantially contemporaneous with the arrest of the defendant. We wholeheartedly adopt the reasoning of Judge McLaughlin in *United States v. Dento*, 382 Fed. 2d 361 (Third Circuit, 1967), cert. denied 389 U. S. 944, 19 L. ed. 2d 299 (1967); reh. den. 389 U. S. 997, 19 L. ed. 2d 502 (1967). We find the factual aspects of the *Dento* case startlingly similar to the facts presently before us.

While it may be the prudent and wise act at this point to place this phase of the case to rest, we feel compelled, nevertheless, to touch upon one other facet that causes us some consternation. As stated, Fisher entered a plea of guilty and testified for the Commonwealth. His testimony not only implicated Blum in the commission of these two armed robberies, but also related that he had a certain gun, dark glasses and gloves, during the perpetration thereof. This testimony, subject to proper instructions to the jury, was admissible. It would be reaching an asinine result if an accomplice could verbalize through testimony that he had certain physical objects used by him in hold-ups, that he stowed the gun, etc., in the car

driven by his partner in the crime thereafter, but would be prevented from identifying those objects to the jury at the time of the trial. If this is the result strived for on behalf of the defendant Blum, then it would be the Commonwealth that would be placed on the horns of a dilemma. If such items could not be physically shown to Fisher and in that manner brought to the jury's attention, the defense could, in its closing speech, comment and argue to the jury that Fisher's testimony should not be accepted as credible as the physical objects were not identified or their absence explained. It strikes us that fair play would dictate, even if no such argument was made, that the trial judge should, in his charge, advise the members of the jury that a gun, a pair of gloves and sunglasses belonging to Fisher were obtained by the police, but for reasons with which the jurors should not be concerned these physical objects cannot be exhibited at this trial. Without such instruction, the jury could draw an unfavorable inference as to the credibility of Fisher's testimony and, when this logical inference is coupled with the required language of the court's charge as it deals with the credibility of an accomplice's testimony, to our way of thinking, would place the Commonwealth in a most unenviable and unrealistic position.

The defendant next maintains that the trial judge erred in charging that she could be convicted on the uncorroborated testimony of an accomplice. The charge correctly embodied the law of Pennsylvania on this point and there is no rule of law in this jurisdiction forbidding a conviction on the uncorroborated testimony of an accomplice: *Commonwealth v. DiDio*, 212 Pa. Superior Ct. 51 (1968).

It is advanced by the defendant that error was committed when the trial judge charged that an inoperative or unloaded weapon constitutes an "offensive" weapon

within the statutory definition of armed robbery. Although an inoperative or unloaded gun may not be classified as a "deadly" weapon, the manner of its use and the reaction it causes makes it an "offensive" weapon: *Commonwealth v. Johnson*, 212 Pa. Superior Ct. 1 (1968).

It is argued by the defendant that the trial judge erred in the charge given to the jury on conspiracy and in the use of the word "should" when referring to the duties of the jurors. A reading of the entire charge reveals that these assertions are without merit. Reversible error cannot be predicated upon isolated portions of the charge taken out of context, if the charge as a whole had adequately and properly covered the subject: *Commonwealth v. Scoleri*, 399 Pa. 110 (1960). Instructions to a jury must be read and considered in their entirety: *Commonwealth v. Lopinson*, 427 Pa. 284 (1967).

With respect to the remaining questions raised in the motion for a new trial, the issue of the defendant's guilt, we firmly believe, was properly left to the jury who rendered a verdict of guilty.

Therefore, in accordance with the conclusions reached herein we enter the following—

ORDER.

And Now, this 22nd day of November, 1968, the defendant's motion for a new trial is refused and denied. Defendant Sharon Lee Blum is directed to appear for sentencing at a time to be fixed by the District Attorney of this county.

By THE COURT,
Paul R. Beckert, *J.*